

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No.2423 of 2007

Shri Narayan Genu Walunj ..Petitioner

vs.

1. Shri Vithal Balaji Devkar
and others ..Respondents

Shri R.K.Singh for petitioner.
Shri Nitin Deshpande for respondent no.2.

**CORAM: S.C.DHARMADHIARI J.
20th December, 2007**

P.C.

1. At the request of Shri Singh so also at the risk of the petitioner, the respondent nos.3 to 7 are deleted. Respondent no.2 is represented by Shri Deshpande, Advocate and respondent no.1 has not been served. Respondent no.1 is the father of respondent no.2. He need not be served in the present petition because none of the respondents who are defendants to the subject suit have opposed the application by filing the reply. The application which was preferred and has been rejected is Civil Misc.Application No. 5 of 2003. That is filed by the petitioner/plaintiff for restoration of the civil suit which has been dismissed by the Trial Court for default of his appearance.

Reg.Civil Suit No.1 of 1990 was earlier dismissed by the Trial Court. The matter was carried in Appeal and in appeal remand order was passed. At the remand/retrial the petitioner remained absent and the suit was dismissed on 13th September, 2000. The application for restoration was preferred after the delay of 2 years and 6 months. That is on 25th March, 2003. The reason given by the petitioner is that he was suffering from Hepatitis and, therefore, even could not contact his Advocate. The medical certificate has been produced and the same has been perused by the Trial Court. If the medical certificate shows that he was ill and hospitalised for one month and advised rest for 3 months, does not mean that the petitioner was fit enough to pursue the matter. Merely because the petitioner did not produce the document or other material to show that after the rest period he could have instructed his Advocate and taken necessary steps does not mean that the application deserved to be dismissed. The Judge ought to have taken a liberal view in the peculiar facts of this case by accepting this application and imposing appropriate cost, the request of the petitioner for restoration of the suit should have been granted. In such

circumstances, the order under challenge is quashed and set aside. The petition is allowed. The delay stands condoned. However, the petitioner to pay costs quantified at Rs.5000/- to the respondents/original defendants in the Trial Court. The costs to be paid in the Trial Court within two weeks from today. If the cost is tendered and proof is produced the suit shall stand restored to file and must thereafter be disposed of as expeditiously as possible and within a period of six months from today. Needless to state that if the petitioner does not cooperate in its expeditious disposal and seek unnecessary adjournments the learned Judge is free to pass appropriate orders in accordance with law.

(S.C.DHARMADHIKARI J.)